Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1983

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF ON THE MERITS OF APPELLANT LABOR ORGANIZATIONS

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QUESTIONS PRESENTED

1. Does a state public employee bargaining law violate the First and Fourteenth Amendments to the United States Constitution where it requires a public community college board to formally meet and confer only with an exclusive bargaining representative of its instructors, and permits that exclusive representative to retain control over the selection of persons to participate on behalf of it in meet and confer activities?

2. If public community college instructors are constitutionally entitled to run and vote in elections for membership on meet and confer committees established by a public employee bargaining law, do the First and Fourteenth Amendments to the United States Constitution require that a system of cumulative voting be used in conducting such elections?

3. Did the district court abuse its discretion in awarding plaintiff-appellees twenty percent of their costs in this case?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Citation to Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	12
Argument	15
I. The District Court's Order That Public Employees Have A Constitutional Right To A Fair Opportunity To Participate In The Selection Of A Meet And Confer Representative Is Erroneous	15
A. The First Amendment Does Not Entitle Knight To Compel The State Board To Either Listen Or Respond To Him	15
B. Even If The Meet And Confer Process Is Treated As A Non-Public Forum, PELRA's Requirement That The State Board Meet And Confer Only With The Exclusive Representative Of Its Professional Employees Is Not Unconstitutional	21

Page

C. The Lower Court Incorrectly Perceived This Case As Involving Issues Of Academic Freedom 25

D. PELRA Provides A "Fair Opportunity To Participate In The Selection Of The Meet And Confer Representative 31

E. Compelling Governmental Interests Support The Meet And Confer Structure Established By PELRA And Override Any Infringement Of First Amendment Interests 35

II. The District Court's Supplemental Order Requiring That Cumulative Voting Be Used In Meet And Confer Elections Is Without Constitutional Basis 41

III. The District Court Abused Its Discretion In Awarding Appellees Twenty Percent Of Their Costs 44

Conclusion 49

TABLE OF AUTHORITIES

Cases: Page

ADM Corp. v. Speedmaster Packaging Corp., 525 F. 2d 662 (3d Cir. 1975) 47

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 23, 24, 38, 47

Adderly v. Florida, 385 U.S. 39 (1966) 20

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) 19

Branti v. Finkel, 445 U.S. 507 (1980) 18, 34

Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950) 44, 46, 47

City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Board, 429 U.S. 167 (1976) 19, 20, 25

Commonwealth of Pennsylvania v. Local Union 542, I.U.O.E., 507 F. Supp. 1146 (E.D. Pa. 1980) 46

Elrod v. Burns, 427 U.S. 347 (1976) 12, 18

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 30

Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964) 44

Gonzales v. Irizarry, 387 F. Supp. 942 (D.P.R. 1974) 29

Greer v. Spock, 424 U.S. 828 (1976) 20

Page

Hanover Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation, 457 F. 2d 456 (1972) 17

Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wisc. 1974) 29

Jones v. Schellenberger, 225 F. 2d 784 (7th Cir. 1955), *cert. denied* 350 U.S. 989 (1956) .. 47

K-S-H Plastics, Inc. v. Carolite, Inc., 408 F. 2d 54 (9th Cir. 1969) 46

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 26

Knight v. Alsop, 535 F. 2d 466 (8th Cir. 1976) 10

Knight v. Heaney, 444 U.S. 821 (1979) 45

Knight v. Heaney, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied,* 614 F. 2d 1162 (8th Cir. 1980) *cert. denied* 449 U.S. 823 (1980) 10, 45

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 20

Machinists v. Street, 367 U.S. 740 (1961) 23

Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1, 311 N.W. 2d 474 (Minn. 1981) 40

Minneapolis Federation of Teachers v. Minneapolis Special School Dist. No. 1, 258 N.W. 2d 802 (Minn. 1977) 39

Mobile v. Bolden, 446 U.S. 55 (1980) 42

Page

NLRB v. Allis-Chalmers Mfg. Co.,
388 U.S. 175 (1967) 30
NLRB v. Yeshiva University,
444 U.S. 672 (1980) 28
Ogilvie v. Independent School Dist. No. 341,
329 N.W. 2d 555 (Minn. 1983) 40
Peacock v. Board of Regents,
380 F. Supp. 1081 (D. Ariz. 1974) 29
Perry Education Association v. Perry Local
Educator's Association, —— U.S. ——,
74 L. Ed. 2d 794 (1983) 13, 19, 20, 21, 22, 23, 24, 25
Pickering v. Board of Education,
391 U.S. 563 (1968) 17
Railway Employers Dept. v. Hanson,
351 U.S. 225 (1956) 23
Scientific Holding Co. v. Plessey, Inc.,
510 F. 2d 15 (2d Cir. 1974) 46
Shelton v. Tucker,
364 U.S. 479 (1960) 17, 26, 27
Smith v. Arkansas State Highway Employees,
Local 1315, 441 U.S. 463 (1979) 12, 16
Steel Construction Co. v. Louisiana Highway Comm'n.,
60 F. Supp. 183 (E.D. La. 1945) 46
Sweezy v. New Hampshire,
354 U.S. 234 (1957) 26, 27
United States Postal Service v. Greenburgh
Civic Association, 453 U.S. 114 (1981) 20, 21, 22
Whitcomb v. Chavis,
403 U.S. 124 (1971) 42, 43

Page

Minnesota Statutes:

Minn. Stat. § 136.60 (1982) 4
Minn. Stat. § 136.61 (1982) 4
Minn. Stat. § 179.61 (1982) 2, 3, 36
Minn. Stat. § 179.63, subd. 10 (1982) 6
Minn. Stat. § 179.63, subd. 15 (1982) 7
Minn. Stat. § 179.63, subd. 16 (1982) 5
Minn. Stat. § 179.63, subd. 18 (1982) 5, 6
Minn. Stat. § 179.65, subd. 1 (1982) 7
Minn. Stat. § 179.65, subd. 2 (1982) 9
Minn. Stat. § 179.65, subd. 3 (1982) 6
Minn. Stat. § 179.66, subd. 1 (1982) 5
Minn. Stat. § 179.66, subd. 3 (1982) 6
Minn. Stat. § 179.66, subd. 7 (1982) 5, 7
Minn. Stat. § 179.67 (1982) 5, 31
Minn. Stat. § 179.73 (1982) 6, 7, 37
Minn. Stat. § 179.76 (1982) 2, 3

Federal Statutes:

28 U.S.C. § 1253 2
28 U.S.C. § 2281 2
28 U.S.C. § 2284 2
42 U.S.C. § 1983 2
42 U.S.C. § 1985(3) 2
42 U.S.C. § 1986 2
42 U.S.C. § 1994 2

United States Constitution:

First Amendment 2, 12, 13, 14, 15, 16, 17, 18, 19, 25, 26, 31, 32, 33, 35, 41, 42, 45, 46

Page

Ninth Amendment 2
Tenth Amendment 2
Thirteenth Amendment 2
Fourteenth Amendment 2, 42

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Baldridge, J., Shared Governance: *A Fable About The Lost Magic Kingdom*, 68 *Academe* 12, 13 (1982) 27, 28

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CITATION TO OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It has been unofficially reported at 111 LRRM 3156.

JURISDICTION

This action was commenced by plaintiffs pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1994 alleging violations of their rights under the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. The action sought an injunction restraining the enforcement and operation of a state statute, and thus a three-judge district court panel was established pursuant to 28 U.S.C. §§ 2281 and 2284.

The district court issued its order granting in part and denying in part the relief sought by plaintiffs on March 31, 1982. Motions for relief from judgment, for a new trial and to alter or amend the judgment by both plaintiffs and defendants were denied by the court on August 13, 1982. The appellant labor organizations filed a notice of appeal with the United States District Court for the District of Minnesota on October 12, 1982.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

STATUTES INVOLVED

The district court declared unconstitutional, as applied, certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. §§ 179.61-179.76 (1982). Pertinent portions of PELRA are set forth in the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges at 87-95.

In addition, the appellant labor organizations' appeal of the district court's cost award to plaintiffs involves Rule 54(d), Fed. R. Civ. P., which provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs

shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

This case was initiated by the appellees to challenge certain provisions of the Minnesota Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1982) (hereinafter referred to as "PELRA") as unconstitutional both on their face and as applied. PELRA establishes a comprehensive framework for collective bargaining between public employers and their employees in Minnesota. The appellees, who are public employees, challenged the constitutionality of exclusive representation in collective bargaining under PELRA, the ability of the appellant Minnesota Community College Faculty Association to constitutionally act as the exclusive representative, and the constitutionality of the "meet and confer" procedures established by PELRA. The appellees sought injunctive and declaratory relief against enforcement of the provisions of PELRA pertaining to these issues. The lower court denied the requested relief with one exception: it enjoined PELRA as applied in the area of the "meet and confer" procedures.

Appellee Leon W. Knight and the other plaintiff-appellees (hereinafter collectively referred to as "Knight" or "Knight and his colleagues") are employed as instructors in the Minnesota Community College System (hereinafter "the System"). At the time of trial, the System consisted of eighteen institu-

tions located throughout the State of Minnesota which provide a two-year program of post-secondary education to students. Minn. Stat. § 136.60 (1982). The System is operated by the appellant Minnesota State Board for Community Colleges (hereinafter "State Board"), a state agency composed of citizens appointed by the governor. Minn. Stat. § 136.61 (1982). The State Board selects a chancellor to act as chief executive and operational officer of the System. (R. 395-96).[1] Each community college has a president who reports to the chancellor. (R. 396). The appellant Minnesota Community College Faculty Association (hereinafter "MCCFA") is a labor organization which is certified pursuant to PELRA as the exclusive collective bargaining representative of all instructors employed by the State Board. It is affiliated with appellants Minnesota Education Association and National Education Association (the three organizations shall be referred to collectively as "the appellant labor organizations").

Prior to 1971, the relationship between the instructors and the administration on each campus was largely a local matter. As a result, the level of participation by instructors in the operation of the community colleges varied widely. On some campuses the instructors and the administration discussed campus issues through organizations such as a faculty senate. Other campuses were characterized by the centralization of decision-making in the administration. (A. 46).[2]

In 1971, the State of Minnesota enacted PELRA, which contained provisions with a substantial impact on the relationship between the instructors and the administration. The framework established by PELRA borrows in certain respects

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[1] All references to the trial transcript which have not been reproduced in the joint appendix shall be cited as (R. ——).

[2] All references to the joint appendix shall be cited as (A. ——).

from familiar principles of labor law established in the private sector. In particular, PELRA embraces the concept of exclusivity of the certified exclusive representative. The statute sets forth procedures, supervised by a state agency (the Bureau of Mediation Services), to ensure the fair selection and certification of an employee organization as exclusive representative by a majority of the employees in an appropriate bargaining unit. Minn. Stat. § 179.67 (1982). Once certified, the employee organization under PELRA, like that in the private sector, has the exclusive right and duty to represent all employees in the bargaining unit in the negotiation of "terms and conditions of employment." [3] PELRA specifically prohibits a public employer from meeting and negotiating with anyone other than the exclusive representative.[4] In addition, also similar to the private sector, PELRA restricts the duty to meet and negotiate[5] imposed on the public employers to those matters which are "terms and conditions of employment." The public employer is not required to meet and negotiate concerning matters of "inherent managerial policy," which include "such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel."[6] Pursuant to PELRA, the State Board and the MCCFA have negotiated

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[3] PELRA's definition of "terms and conditions of employment" is found at Minn. Stat. § 179.63, subd. 18 (1982) (Juris. A. 89). All references to the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges shall be cited as (Juris. A. ——).

[4] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[5] PELRA's definition of "meet and negotiate" is found at Minn. Stat. § 179.63, subd. 16 (1982) (Juris. A. 89).

[6] Minn. Stat. § 179.66, subd. 1 (1982) (Juris. A. 90).

successive collective bargaining agreements covering terms and conditions of employment. (Pl. Ex. 1; R. 92).[7]

Unlike the private sector, PELRA also established new rights to participation by professional employees[8] with respect to those matters which are outside the scope of mandatory negotiations but which relate to employment. In this regard, PELRA, at Minn. Stat. § 179.73 (1982), provides:

> Subdivision 1. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under section 179.63, subdivision 18 [which defines negotiable "terms and conditions of employment"].
>
> Subd. 2. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179.63, subdivision 18, relating to the services being provided to the public. The public employer shall provide the facilities and set the time for such conference to take place, provided that the parties shall meet together at least once every four months.[9]

The statute defines "meet and confer" as "the exchange of views and concerns between employers and their respective

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[7] All references to plaintiffs' trial exhibits shall be cited as "Pl. Ex."

[8] PELRA's definition of "professional employees" is found at Minn. Stat. § 179.63, subd. 10 (1982) (Juris. A. 88).

[9] Other sections of PELRA which emphasize this right are found at Minn. Stat. § 179.65, subd. 3 (1982), Minn. Stat. § 179.66, subd. 3 (1982) (Juris. A. 90-91).

employees." Minn. Stat. § 179.63, subd. 15 (1982). As professional employees, instructors in the System acquired the right to "meet and confer" through a representative with the State Board concerning those matters classified as within the inherent managerial prerogative as a result of PELRA's enactment.

It is clear from the language of Minn. Stat. § 179.73, set forth above, that even professional employees who have determined not to collectively bargain terms and conditions of employment have the right to meet and confer through a selected representative. Where a collective bargaining representative has been chosen, however, that "meet and negotiate" representative is also the "meet and confer" representative. The principle of exclusivity applies equally to the meet and confer function, and thus the employer must only engage in formal meet and confer with the exclusive representative.[10] PELRA specifically preserves the right of individual employees to express views, grievances, complaints or opinions concerning employment related matters.[11]

The implementation of PELRA and the selection of the MCCFA as the exclusive representative caused a restructuring of the relationship between the instructors and the State Board. On those campuses where there had been little or no faculty participation in the governance of the college, PELRA resulted in a dramatic increase in faculty input both in matters covered by meet and negotiate and in matters covered by meet and confer. On those campuses where there had previously been faculty senates or other formal vehicles for

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[10] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[11] Minn. Stat. § 179.65, subd. 1 (1982) (Juris. A. 89). This point is emphasized by Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

faculty input, the governance structures were replaced by both the meet and negotiate, and meet and confer procedures. (A. 46-48).

The meet and confer structure which developed is two-tiered, and is set forth in the collective bargaining agreement between the State Board and the MCCFA.[12] On the first level, both the MCCFA and the State Board are represented by statewide meet and confer committees which discuss issues applicable to the entire system. On the second level, the MCCFA chapter at each campus and the administration at each campus are represented by local "exchange of views" ("EOV") committees which discuss issues specific to the particular campus falling within the area of meet and confer. Unlike the state level where there is a single meet and confer team for each side, there will typically be several local EOV committees at a single campus. The committees discuss such designated topics such as "Personnel", "Student Affairs," "Curriculum", "Facilities", "Fiscal Matters" and "General Matters." At some campuses however there are as few as one EOV committee.

As previously noted, the meet and confer committees discuss subjects which are not within the mandatorily negotiable "terms and conditions of employment". Such subjects have included selection and evaluation of community college administrators, planning of new facilities, academic accreditation, and student rights. (A. 41). Meet and confer committees have also discussed interpretation of the collective bargaining agreements resulting from the meet and negotiate process. *Id.*

In choosing individual instructors to represent it on meet and confer committees, the MCCFA has observed the practice

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[12] The provisions of the contract pertaining to meet and confer structure are found in Pl. Ex. 1; R. 92 (A. 35-36).

of selecting only persons who are members of the MCCFA. (A. 43). Under PELRA, public employees are not required to join the organization which acts as their exclusive representative.[13] Non-members may, however, be required to pay a fair share fee to the exclusive representative not to exceed 85 per cent of regular membership dues and not to exceed the amount of regular membership dues less the cost of benefits financed through dues and available only to members.[14]

The establishment of the meet and confer procedure has not prevented instructors, whether they belong to the MCCFA or not, from expressing their views on matters which come before the meet and confer committees. (Juris. A. 50, A. 92-93, 98-100, 130-131, 148-150, 184-189). The State Board and the local administration on each campus regard the MCCFA as the official faculty spokesman, and the position it advocates is considered the official faculty position. (A. 50). Testimony at trial makes clear, however, that the employer recognizes that individual instructors may have different opinions on any given issue. *Id.* A variety of avenues exist and have been utilized for the expression of those individual views. Foremost is the ability of instructors to communicate to individual administrators their views on issues deemed important. (A. 61-62, 72). The college administrators called by Knight at trial testified that such dialogue is a common occurrence. (A. 84-85, 100-102). Furthermore, there are a number of occasions where expression of individual views is invited, including State Board meetings which rotate among the various campuses, and meetings routinely held by college

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[13] Minn. Stat. 179.65, subd. 2 (1982).
[14] Minn. Stat. § 179.65, subd. 2 (1982).

presidents during the school year. (A. 57).[15] Thus, while the meet and confer process gives weight and focus to the faculty position as formulated by the faculty's exclusive representative, all instructors may freely express their views on subjects within the purview of meet and confer, whether those views coincide with the position forwarded by the MCCFA or not.

The primary issue raised before the Court by this appeal results from the MCCFA's practice of appointing only its members to meet and confer committees. The complaint and request for a three-judge district court was filed in the United States District Court for the District of Minnesota on December 19, 1974. After Knight's request for a three-judge panel was denied by the District Court, the United States Court of Appeals for the Eighth Circuit, on May 17, 1976, reversed and ordered such a panel established. *Knight v. Alsop*, 535 F. 2d 466 (8th Cir. 1976). Discovery followed, with Knight unsuccessfully seeking appellate relief from certain district court decisions concerning discovery issues. *Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) (denying petition for writ of mandamus) *cert. denied*, 449 U.S. 823 (1980). On December 13, 1979, the District Court appointed a Special Master to conduct the trial of this matter. The trial commenced on August 4, 1980, and recommended findings of fact were issued by the Special Master on March 23, 1981. (Juris. A. 54). The District Court issued its Findings of Fact on November 16, 1981 (Juris.

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[15] Such occasions include "town meetings" open to all instructors, departmental meetings with the college president, faculty breakfasts and lunches, and being available in the common area of the campus. (A. 61-62, 83-84, 98-100).

A. 32), and its Memorandum Opinion and Order on March 30, 1982. (Juris. A. 7).

In addition to the meet and confer issue, Knight raised substantial issues challenging the constitutionality of exclusive representation in collective bargaining under PELRA, and the ability of the MCCFA constitutionally to act as an exclusive representative. The District Court's order ruled against Knight on these issues. Further, the court upheld the facial constitutionality of the meet and confer provisions of PELRA. The court sustained Knight's contention, however, that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution for the meet and confer process to operate in a way which excludes instructors who are not members of the MCCFA from participating in the selection of or being eligible for membership on meet and confer committees. In addition, the district court ruled that twenty percent of appellees' costs would be assessed against the State Board and the MCCFA.

Appeals were filed with this Court by the State Board and the appellant labor organizations on November 30, 1982 and December 10, 1982, respectively. The Court noted probable jurisdiction on March 28, 1983, and ordered the two appeals consolidated and set for oral argument.

Prior to this Court noting probable jurisdiction, elections were conducted in the System in which all instructors (MCCFA members and non-members alike) were permitted to nominate candidates, run for election and vote. The elections were for positions on both the statewide and local meet and confer committees. Each voter was required to cast one vote for as many candidates as there were positions to be filled on the various committees. No non-MCCFA members ran for the statewide committee while several did pursue local

EOV positions. The elections resulted in MCCFA members holding all positions on all meet and confer committees.

Knight subsequently moved the district court for relief, claiming that the election procedures were not consistent with the Court's order of March 30, 1982. On April 15, 1983, the Court ruled that the election procedure had failed to provide Knight with a "fair opportunity to select and serve as meet and confer representatives." In order to provide such a fair opportunity, the court ordered that new elections be conducted using a system of cumulative voting. (A. 192-193).

On April 26, 1983, the appellant labor organizations moved this Court for leave to expand the appendix and add the issue of requiring cumulative voting raised by the lower court's April, 1983, order. The Court granted this motion on June 3, 1983.

SUMMARY OF ARGUMENT

The lower court's ruling that PELRA's meet and confer procedure violates the First Amendment improperly assumes the existence of First Amendment interests in two respects. First, it assumes that there is a right under the First Amendment not only to speak, but also to compel the government to listen and to respond. This assumption is contrary to *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). Second, it assumes that the First Amendment limits the discretion of the government in choosing who to confer with concerning policy decisions. This assumption is contrary to *Elrod v. Burns*, 427 U.S. 346 (1976). While the First Amendment may have some impact on rights of access to public forums, and even non-public forums, the meet and confer process is not a forum; it is private consultation by the gov-

ernment. Therefore, there is no First Amendment interest implicated by the meet and confer system.

Even if meet and confer is considered to be a non-public forum, the exclusive right of the MCCFA, as exclusive representative, to meet and confer is reasonable, and is not intended to suppress a speaker's views because a public official disagrees with them. The meet and confer structure therefore meets the standard adopted in *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 74 L.Ed. 2d 794 (1983).

The fact that this case arises in a higher education system does not mean that First Amendment academic freedom principles are implicated. The lower court's assertion that the meet and confer process involves academic freedom issues is premised on an erroneous view of the tradition of faculty participation in the governance of the Minnesota community colleges. Other courts have refused to recognize any First Amendment right to faculty governance. Moreover, by undermining the exclusivity of the MCCFA the lower court's decision detracts from rather than enhances the influence of the faculty in the affairs of the community colleges.

Even if the First Amendment requires that faculty members be extended "a fair opportunity to participate" in the selection of the meet and confer representative, PELRA provides such an opportunity. PELRA provides extensive procedures for the democratic selection of the exclusive representative in which all faculty members, regardless of their organizational affiliations, may participate. Instructors are not compelled to join any association in order to participate in this process. Any pressure which instructors feel to conform their views to those of the majority is inherent in any system for democratic election of representatives.

Compelling governmental interests support PELRA's meet and confer structure, even if First Amendment interests are present and are held to be infringed. These interests include avoiding confusion in presentation of employee views, avoiding subjecting the employer to conflicting demands and minimizing rivalries within the bargaining unit. If separate and independent representatives acted in the meet and confer, and meet and negotiate areas, the resulting conflict and inconsistency would undermine the functioning of both and jeopardize the interest of affording fully effective representation to public employees.

The District Court's supplemental order requiring cumulative voting in the election of meet and confer representatives is wholly unprecedented and exceeds even the measures ordered in the sensitive area of alleged racial discrimination in the election of candidates to public office. The lower court's order improperly suggests a First Amendment right to proportional representation.

The District Court's requirement that the MCCFA and the State Board pay to Knight twenty percent of his costs is an abuse of discretion. The portion of costs awarded bears no rational relationship to the portion of the proceedings on which Knight succeeded. The cost award requires the MCCFA and the State Board to subsidize the unreasonable conduct of Knight and his counsel throughout this case.

ARGUMENT

I. THE DISTRICT COURT'S ORDER THAT PUBLIC EMPLOYEES HAVE A CONSTITUTIONAL RIGHT TO A FAIR OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF A MEET AND CONFER REPRESENTATIVE IS ERRONEOUS.

A. The First Amendment Does Not Entitle Knight To Compel The State Board To Either Listen Or Respond To Him.

The District Court's decision is fundamentally flawed by two assumptions which it makes concerning the role of the First Amendment in private consultations by government policymakers. First, the District Court improperly assumes that Knight has a First Amendment right to exchange views with the State Board. Second, the District Court erroneously assumes that the First Amendment limits the discretion of government policymakers in deciding with whom to consult. Both of these assumptions are not only contrary to the First Amendment principles long established by the Court, but, if adopted, would create enormous practical problems as public officials attempt to satisfy the lower court's standard.

Knight has no First Amendment right to exchange views with the State Board. The First Amendment guarantees to Knight the right to express and publish his views on any subject he chooses, including, obviously, the subjects discussed in meet and confer meetings. The First Amendment does not extend to Knight the right, however, to compel any individual or entity, private or public, to listen to his views or to respond to his views.

It is clear that the District Court's reading of the First Amendment grants to Knight a right to compel the State

Board to both listen to him and to respond to him. This First Amendment right to compel a listener and a response is apparent from the District Court's reliance on the concept of "meaningful expression." The District Court recognizes in both its factual findings and its memorandum opinion that Knight is fully able to express his views at any time on a variety of subjects, including subjects discussed in meet and confer meetings. Further, college administrators have listened and discussed such subjects with Knight and his colleagues on an informal basis. This, the District Court rules, is insufficient because Knight's expression is not a part of the "official" system for faculty expression through the MCCFA to which the State Board and its administrators are by statute required to listen and respond. According to the District Court, Knight is entitled under the First Amendment to "meaningful expression," which consists of a "fair opportunity to participate" in the meet and confer process. (Juris. A. 20, 22-23). Because the essence of the meet and confer process is the right to compel the State Board to both listen and respond concerning matters of "inherent managerial policy" the District Court is holding that Knight's purported First Amendment right to "meaningful expression" entitles him to compel a listener and a response.

Recognition of a Constitutional right to compel a responsive listener is plainly contrary to the decisions of this Court. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Court rejected the claim that the First Amendment entitled public employees to submit work-related grievances to their employer through a labor union. In its *per curiam* opinion, the Court stated definitively:

> The public employee surely can associate, and speak freely and petition openly, and he is protected by the

> First Amendment from retaliation for doing so. See Pickering v. Board of Education, 391 U.S. 563, 574-575, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); Shelton v. Tucker, 364 U.S. 479, 5 L. Ed. 231, 81 S. Ct. 247 (1960). *But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.*

441 U.S. at 465 (footnotes omitted) (emphasis supplied). The Court also recited with favor language from the Court of Appeals for the Seventh Circuit's decision in *Hanover Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation*, 457 F. 2d 456 (1972):

> The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective."

441 U.S. at 464-65. Clearly, the First Amendment does not support Knight's claim to "meaningful expression" insofar as that claim extends to the right to compel a responsive listener.

The District Court's decision also depends on the improper assumption that the First Amendment limits the discretion of public officials engaged in policymaking in deciding with whom they wish to consult. It holds that PELRA's requirement that the State Board shall formally meet and confer only with the exclusive representative has resulted in a "practice of systematically excluding non-members of MCCFA" which, it concludes, "deprives such persons of a fair opportunity to participate in the meet and confer process." (Juris. A. 24).

This Court has clearly held that the First Amendment does not interfere with the discretion of the government to choose the persons to perform governmental policymaking functions.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court ruled that non-policymaking employees in the Cook County Sheriff's Department could not be terminated because of their political affiliations. The Court also stated that public employees who *are* in policymaking positions, however, *could* be terminated because of their political affiliations. 427 U.S. at 367-68, 372. This principle was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980), where the Court ruled that assistant public defenders could not be discharged because of their political affiliations. The employees at issue in *Branti* were not within *Elrod's* "policymaker" exception because their "primary, if not the only, responsibility . . . is to represent individual citizens in controversy with the State." 445 U.S. at 519. Once again, the Court stated that public employees in policymaking positions could be discharged where "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

The case at hand is far easier to resolve than the situations presented in *Elrod* and *Branti*. Here there is no question of an employee's termination, or of an employee's right to hold and express any opinion or belief. Knight will continue to hold his position with no adverse impact on his terms and conditions of employment regardless of the views he expresses or publishes. The sole question is the discretion of the State to choose with whom it wishes to privately consult concerning matters of community college policy. As *Elrod* and *Branti* recognize, the First Amendment does not limit that discretion.

As a practical matter, public officials must be granted discretion regarding with whom they wish to confer. It requires no great imagination to perceive the impossible burden which would be placed upon government by requiring as a matter of constitutional law that public officials listen and

respond to private individuals upon demand—or that such individuals be provided a "fair opportunity" to participate in choosing representatives which could then exert such compulsive power. The government must be free to choose without constitutional stricture how and with whom it wishes to conduct private consultations, or government will likely become critically impaired from performing its functions.

Such practicalities are recognized by the decisions of the Court which hold that the government need not create public forums available to any citizen who wishes to express views to public officials. As was observed by Mr. Justice Holmes, the "constitution does not require all public acts to be done in town meeting or assembly of the whole" for there "must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

The Court has held that when a forum is established which is recognized as a public forum through tradition or designation, the government is under First Amendment constraints in excluding persons from voicing their views in that forum. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Board*, 429 U.S. 167 (1976). Even if the government establishes a non-public forum, the regulations concerning its use must be reasonable and not be an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983); *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 131 n. 7 (1981).

The meet and confer process is neither a public forum nor a non-public forum; it is not a forum at all. The meet and confer process is the government's decision to consult with

certain persons prior to making policy decisions that are within its discretion. The state has decided to require the State Board to listen and discuss such issues with the exclusive representative of professional public employees.

This element of consultation distinguishes meet and confer from both the public and non-public forums. There is no dispute that meet and confer is not a public forum, as the lower court specifically so found. (Juris. A. 22, 50).[16] The non-public forums considered by this Court have uniformly involved an asserted claim to use government property (or property peculiarly subjected to government regulation) to communicate to individuals. *See, e.g., Perry Education Association v. Perry Local Educator's Association, supra* (school mail system); *United States Postal Service v. Greenburgh Civic Associations, supra* (government regulated postal letter box); *Greer v. Spock,* 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (advertising space on municipal transit); *Adderly v. Florida,* 385 U.S. 39 (1966) (county jail). None of the cases decided in this area have suggested that the government is under any constraints in deciding with whom it wishes to confer. As the Court noted in *City of Madison*:

> Plainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business.

429 U.S. at 175 n. 8.

Because Knight has no constitutional right to compel a responsive listener, nor a right to interfere with the state's discretion in choosing with whom to consult, the lower court's decision should be rejected.

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[16] See also discussion, *post,* at p. 21.

B. Even If The Meet And Confer Process Is Treated As A Non-Public Forum, PELRA's Requirement That The State Board Meet And Confer Only With The Exclusive Representative Of Its Professional Employees Is Not Unconstitutional.

The state's decision to engage in formal meet and confer only with the exclusive representative of those professional employees who have decided to collectively bargain is reasonable, and is not an effort to suppress expression merely because the state opposes the excluded speakers' views. For this reason, even if meet and confer is regarded as a non-public forum, it is nevertheless constitutional for the state to restrict access to meet and confer to the exclusive representative of its professional employees, where those employees have selected one.

As noted above, the lower court found that the meet and confer process is not a public forum. (Juris. A. 22, 50). The lower court's conclusion that meet and confer is not a public forum is fully consistent with this Court's analysis in *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983).

Having found that meet and confer is not a public forum, however, the lower court committed clear error in ruling that the practice of limiting access to meet and confer to the exclusive representative could only be sustained "if it is supported by compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 24). With respect to non-public forums, as noted above, government regulations will be upheld if they are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association*, 74 L. Ed. 2d at 805; *United States Postal Service v. Greenburgh*

Civic Associations, 453 U.S. 114, 131 n. 7 (1981). The state's decision to meet and confer only with the exclusive representative of its professional employees meets this test.

The recent *Perry Education Association* decision is dispositive on this question. There the Court upheld the school district's practice of granting the teachers' exclusive representative, the Perry Education Association ("PEA") access to the school mail system while denying to other teacher organizations similar access. The Court found that the school mail system was not a generally open public forum, but rather was a nonpublic forum which may be reserved for "its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable, and not an effort to suppress expression merely because public officials oppose the speaker's view." 74 L. Ed. 2d at 805. The restriction on access to the school mail system satisfied this standard. The Court specifically rejected the argument that a distinction between an organization certified as the exclusive representative and one not so certified was intended to discourage one viewpoint and advance another.

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views.

74 L. Ed. 2d at 807. The Court also found that limitation of mail box access was "reasonable." This holding was based upon the PEA's participation, as exclusive representative, in an official status with respect to the operational structure of the school district. 74 L. Ed. 2d at 808-09. The PEA had a special need for access to the school mails, and the school district had a special interest in seeing that the need was fulfilled. Further, a substantial interest in labor-peace within the

schools was fulfilled by excluding rival unions from the use of school mails. *Id.* Finally, the Court noted that substantial alternative channels of communication were available to those teacher organizations that did not hold the status of exclusive representative. 74 L. Ed. 2d at 810.

In this case the MCCFA, as exclusive representative, has the same status held by the PEA in *Perry Education Association*, and therefore the exclusion of others from meet and confer is not intended to encourage one viewpoint and discourage another. Because the State Board must meet and confer with the MCCFA as the representative of the faculty regardless of what position or view it expresses, there is no effort to suppress expression based upon the speaker's view.

The limitation of access to meet and confer to the exclusive representative is also reasonable for the reasons expressed in *Perry Education Association*. The Court found the restricted use of mails by the PEA reasonable given the PEA's exclusive status. In the instant case, the reasonableness of the restriction is even more fundamental in that it pertains to the right and the need of the State Board to deal with an exclusive agent on meet and confer issues in the first place. This Court ruled in *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26 (1977), that the interest of the state in dealing only with an exclusive agent is more than "reasonable"—it is supported by "important governmental interests" that therefore justified compelling public employees to financially support the exclusive representative, despite an "impingement on associational freedom." Relying on its prior decisions in *Railway Employers' Dept. v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961), the Court stated:

> The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law.

> The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid.

431 U.S. at 224.

The same interests make the government's decision to meet and confer only with an exclusive representative a reasonable one.[17] The state has a right to structure and organize its consultations with employees. Indeed, even the lower court recognized that the state could require meet and confer to occur through *representatives.* (Juris. A. 22). It is eminently reasonable for the state to rely on an exclusive representative to formulate and express the views of the employees it represents. This is particularly true given the ongoing relationship between employer and exclusive representative on bargainable issues. The dividing line between bargainable and non-bargainable issues is not always clear; in many cases—such as budget retrenchment—elements of both will be present. The potential for disruption of labor peace is obvious if the employer is confronted with possibly inconsistent or conflicting demands of separate meet and negotiate, and meet and confer representatives.

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[17] The lower court specifically upheld PELRA's meet and negotiate structure, but ruled that there is less of a governmental interest in limiting access to meet and confer than in limiting access to meet and negotiate. (Juris. A. 25). As is subsequently argued, the lower court's conclusion is erroneous in this regard. *See* discussion, ***post,*** at pp. 35-41. It is sufficient to note here that even if the government interests are not considered "important," they are certainly "reasonable" under the standard articulated in *Perry Education*

The reasonableness of PELRA's meet and confer structure is also apparent because instructors have ample alternative means to express their views. As noted earlier, instructors may and do communicate informally with System administrators, and participate in other forums made available to all faculty.

Under *Perry Education Association*, therefore, even if the meet and confer process is characterized as a non-public forum, the state may permissibly limit participation to those persons designated by the MCCFA. *See also City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 177-178 (1976) (concurring opinion of Brennan, J., joined by Marshall, J.) (". . . the First Amendment plainly does not forbid [the state] from limiting attendance at a collective bargaining session to school board and union bargaining representatives and denying [individual employees] the right to attend and speak at the session"). Such a restriction is reasonable under the First Amendment and is not an effort to suppress expression because of its content.

C. The Lower Court Incorrectly Perceived This Case As Involving Issues Of Academic Freedom.

The lower court's conclusion that First Amendment interests were implicated in the conduct of meet and confer sessions was heavily influenced by its belief that issues of academic freedom in higher education were involved. It referred to issues considered in meet and confer as having "a special character as a matter of tradition, public policy and constitutional law." (Juris. A. 49). The lower court then relied upon

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Association. Because this case involves, at best, access to a non-public forum, rather than the compelled financial support at issue in *Abood*, the "reasonableness" standard established by *Perry Education Association* is the proper test to be applied here.

this Court's decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Shelton v. Tucker*, 364 U.S. 479 (1960) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) to conclude that the "vital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech." (Juris. A. 21). Further, the court expressly limited its decision to the area of higher education, despite the fact that all professional public employees in Minnesota have the right to meet and confer. (Juris. A. 23 n. 19, 28 n. 21). The court's rationale relies on an erroneous assumption concerning faculty governance traditions, is incorrect as a matter of constitutional law, and has the effect of inhibiting the interests it professes to advance.

The precedent cited by the lower court recognizes the educational setting as an area of specific application of First Amendment principles. These principles, however, are not offended by PELRA's meet and confer structure because the meet and confer process does not impinge upon the educational activities historically entrusted to individual faculty members. The lower court's findings of fact include the following:

> Certain rights that might be characterized as elements of academic freedom are expressly protected by the employment contract [negotiated by the State Board and the MCCFA] *e.g.*, the right of faculty members to select their course materials and textbooks, to choose their methods of teaching, to research and publish their work, to evaluate student performance and to select library materials.

(Juris. A. 52). Meet and confer plainly does not involve such issues as compulsory loyalty oaths (as in *Keyishian*), intru-

sion by the state into the content of a professor's lectures (as in *Sweezy*), or compulsory divulgence by teachers of membership in associations (as in *Shelton*). The lower court acknowledges that such cases are not controlling here. (Juris. A. 21). The lower court offers the opinion, however, that the tradition of faculty governance is an issue of similar constitutional magnitude.

The court's view that the meet and confer process "codifies a long-standing tradition of participation in college governance" represents a misconstruction of the record and the realities of life in the Minnesota community colleges. The "meet and confer" process gave to these community college instructors a right which they had previously not enjoyed: the right to insist that the administration listen and respond to faculty views concerning non-bargainable issues as presented by a faculty representative. The record clearly establishes that prior to the passage of PELRA, instructors at the community colleges could participate in dialogue concerning campus issues only to the extent permitted by various college administrators. At some campuses, faculty participation was minimal to non-existent; at all campuses individual college presidents and administrators unilaterally determined the extent of faculty input.[18] It is unfair and unrealistic to assume that faculty governance traditions perhaps existing in a few elite, long-established colleges and universities also existed in this state-operated system of two-year community colleges. As one commentator has observed:

> We hear much weeping about the loss of shared governance on American campuses. In some respects, the weeping concerns a Magic Kingdom that never even existed; in other cases, the weeping has some real basis.

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[18] See discussion, *ante*, at p. 4.

> The ancient ritual of shared governance has rarely been practiced in modern times. Maybe it existed in the Middle Ages, or at Oxford, or at the Sorbonne; and maybe it still occurs at a few universities. But for most faculty and most institutions most of the time real shared governance is as mythical as a fable.
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> . . .
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> But in any event [the] Magic Kingdom [of shared faculty governance] is a small—no, tiny—part of the forest. In the rest of the forest, the people rarely worship shared governance. Community colleges are usually dominated by rigid bureaucracies and heavy-duty administrators. Most state colleges, born from teacher's colleges, do not even have pretentions about faculty involvement in decisions. And with a few exceptions, the liberal arts colleges are fiefdoms of presidents who, with the acquiescence of docile trustees, may call the shots, hire and fire the faculty, and decide what color the new dorm curtains will be.

J. Baldridge, *Shared Governance: A Fable About the Lost Magic Kingdom*, 68 *Academe* 12, 13 (1982).[19] The establishment of a legislatively mandated meet and confer process in Minnesota was a victory for community college instructors desiring to effectively consult with the administration on non-

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[19] This Court has recognized that the faculty governance traditions of "mature" universities do not necessarily exist in other institutions of higher learning. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n. 31 (1980). Nowhere is this more likely to be true than in state-created, two-year community college systems. Begin, Settle and Alexander, *The Emergence of Faculty Bargaining*, published in *Campus Employment Relations*, 139 (Tice, ed. 1976); K. Mortiner and T. McConnell, *Sharing Authority Effectively* 54-55 (1978). With respect to such institutions, the observations of Mr. Justice Brennan, dissenting in *Yeshiva*, seem particularly appropriate: ". . . the university of today bears little resemblance to the 'community of scholars' of yesteryear". 444 U.S. at 702.

bargainable issues. It was not a codification of a pre-existing practice. To the extent the lower court's invocation of academic freedom relies on such an assumption, its rationale is incorrect and must be rejected.

The lower court acknoweldged that there is no precedent for its reliance on academic freedom in support of individual instructors' rights to participate in meet and confer—*i.e.*, to require the State Board to listen to their views and respond. (Juris. A. 21 n. 16). In fact, faculty members at institutions of higher learning have in the past attempted unsuccessfully to assert a constitutional right to participate in collegiate decision-making. In *Johnson v. Board of Regents*, 377 F. Supp. 227, 238 (W.D. Wisc. 1974), the court rejected the argument that the faculty of a state university system had a constitutional right to participate in the decision-making process resulting in termination or layoff of faculty members, including the selection of faculty members to be affected, based on enrollment or fiscal considerations. Similarly in *Gonzales v. Irizarry*, 387 F. Supp. 942 (D.P.R. 1974), the court rejected a constitutional attack by members of a public university faculty concerning the rules established to govern election to a faculty senate. The rules allowed certain faculty members to serve on the faculty senate for more than two consecutive terms while barring other faculty members from being elected to more than two consecutive terms. The court rejected the plaintiffs' attack based on free association, free expression and equal protection grounds stating it would not equate voting for members of the academic senate with the right of political freedom and association. 387 F. Supp. at 946.[20]

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[20] *See also Peacock v. Board of Regents*, 380 F. Supp. 1081, 1085 (D. Ariz. 1974) (holding that democratic principles while defensible as a matter of policy, are not constitutionally required in institutions of higher learning).

From these cases it is clear that the lower court's decision is not only premised on unsupported assumptions concerning the tradition of faculty governance, it is contrary to precedent which holds that the Constitution does not dictate governance structure at institutions of higher education.

The lower court's order also has the ironic effect of undermining the interests it purports to support. It states that public policy supports participation by faculty in deciding issues within the scope of meet and confer—issues which it describes as having a "special character as a matter of tradition, public policy and constitutional law." (Juris. A. 20). The meet and confer process established by PELRA is a part of an overall framework for establishing balanced public employee labor relations central to which is the principle of exclusivity. As discussed earlier, the benefits of exclusivity to the government make it a reasonable structure for conferring with employees.[21] The benefits to the instructors are more patent. By focusing the full weight of employee desires through a single representative, employees can more effectively achieve their goals. The lower court's rejection of exclusivity in favor of independently elected meet and confer committees results in the potential for those committees to be internally divided and unable to present a uniform position. Such internal division decreases the impact that the faculty can have on the decisions which are subject to meet and confer.

This Court has recognized the fundamental proposition that employees' strength is increased through collectivization. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61-62 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-181 (1967). This fundamental

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[21] See discussion, *ante*, at pp. 23-25.

principle underlying collective bargaining is just as applicable to meet and confer subjects as it is to negotiated terms and conditions of employment. A primary factor causing faculty members to choose an exclusive representative is the ineffectiveness they have experienced in dealing with college administrations through less organized procedures. Feller and Finken, *Faculty Bargaining In Public Higher Education*, published in *Faculty Bargaining In Public Higher Education: A Report of the Carnegie Council on Policy Studies in Higher Education*, 131 (1977). Exclusive representation *enhances* faculty input, rather than detracting from it.

In summary, the lower court's decision cannot be supported by reference to principles of academic freedom. The decision assumes traditions of faculty governance which do not exist. It is incorrect as a matter of constitutional law. It also serves to weaken the impact of faculty participation in college decision-making which it purports to advance.

D. PELRA Provides A "Fair Opportunity To Participate" In The Selection Of The Meet And Confer Representative.

Even if the lower court's thesis is accepted that the First Amendment principles of free speech or free association require the state to provide Knight with a "fair opportunity to participate" in the selection of meet and confer committees, PELRA provides that "fair opportunity." PELRA establishes comprehensive procedures for the selection of the exclusive representative through a democratic process supervised by an independent state agency, the Bureau of Mediation Services. Minn. Stat. § 179.67 (1982). All faculty members, regardless of their affiliations, may participate in this process, just as they participated in the process of selecting the faculty senates

or councils (on those campuses where such bodies existed). The statute also provides that dissatisfied employees may petition for replacement or disestablishment of the exclusive representative. This procedure allows a "fair opportunity to participate in the selection of governance representatives" if the First Amendment be thought to impose such a requirement.[22]

Knight's complaint arises from the fact that the MCCFA, and not Knight and his colleagues (or any organization they are entitled to form), has been selected by the majority of the faculty to be their meet and confer representative. Because the selection of the exclusive representative has occurred on a democratic basis encompassing all faculty, the fact that non-MCCFA members have not, as a matter of practice, been selected by the MCCFA to express its position as members of meet and confer committees is of no constitutional significance. Certainly a faculty senate may choose its committees from among senate members, without being constitutionally required to appoint faculty members who were not elected to the body. For constitutional purposes, the MCCFA's selection of meet and confer committees is no different.

This argument was noted but not persuasively refuted by the lower court. (Juris. A. 27-28). Viewed in this light, the lower court is actually holding that the First Amendment prohibits the state from requiring the selection of a "meet and negotiate" representative and a "meet and confer" representative at the same time, on the same ballot. The court is ruling

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[22] The lower court asserts that PELRA provides no procedures for selecting a meet and confer representative. (Juris. A. 19 n. 14). This may be true where a unit of professional employees does not engage in meet and negotiate. Because the MCCFA is both a meet and negotiate, and meet and confer representative, however, it is required to submit to the elaborate election process described above.

that professional employees must have separate votes for the "meet and negotiate" and "meet and confer" representatives. Moreover, the lower court's subsequent ruling requiring cumulative voting in meet and confer elections appears to require that there be more than one meet and confer representative, contrary to PELRA's language.[23] Even assuming that the First Amendment establishes a "fair opportunity to participate" requirement in this context, there is no constitutional basis for the court's ruling that the state must conduct a two-tiered selection process for the two functions, or that several meet and confer representatives must be selected.

The existence under PELRA of a "fair opportunity to participate" in the democratic selection of the meet and confer representative also refutes the lower court's asserted infringement of Knight's free association rights. The lower court suggests that aside from infringement of free speech interests, the meet and confer process "also infringes the First Amendment associational rights of faculty members who desire not to join the MCCFA." (Juris. A. 24). This alleged infringement arises because the ability to serve on a meet and confer committee is "completely lost unless one joins the MCCFA." (Juris. A. 28). Further, the court asserts the "right [of non-member instructors] to speak out is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity." (Juris. A. 24).

The court's reasoning is flawed because it forwards as a constitutional infringement what are the inevitable consequences of any democratic representational system. With respect to the lower court's assertion of potential retaliation,

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[23] See discussion, *post*, at p. 43.

it is important to note that the court found no evidence that such retaliation had occurred. (Juris. A. 52). More fundamentally, it is essential to any selection process that the views of the potential representative be taken into account. Certainly instructors voting in the separate meet and confer election envisioned by the lower court's decision would properly consider the views of those running in deciding for whom to vote. If not being voted for or selected as a representative because of one's views is termed "retaliation," then such "retaliation" is a fairly common occurrence. If desire to be selected inhibits a person from speaking his true mind, then such an inhibition can hardly be called unconstitutional. Such "retaliation" and "inhibition," if those labels be used, are inherent in any system for the democratic election of representatives. *Branti v. Finkel*, 445 U.S. 507, 533 (1980) (Powell, J., dissenting) ("[No candidate for elected public office may] contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation.")

The same analysis disposes of the lower court's suggestion that instructors may feel compelled to join the MCCFA in order to participate in the meet and confer process. Non-MCCFA members are not compelled to join the MCCFA in order to participate in the meet and confer process insofar as they are entirely free to participate in the selection of the exclusive representative. The amount of influence which the minority may exert on the majority-selected representative—with regard to the positions taken by that representative, or the persons which the representative chooses to express its positions—may vary according to a number of factors, none of which rises to the level of a constitutionally cognizable compelled association. Republicans living in a district which has

historically sent only Democrats to Congress may feel in some sense "compelled" to join the Democratic Party in order to maximize their influence on issues of importance to them. No one would claim that such "compulsion" violates the First Amendment. Any "compulsion" experienced by a non-MCCFA member is of the same nature. Once it is agreed that a system of democratic representation is to be used,[24] those in the minority will always experience such pressure. The existence of such pressure does not render democratic representation unconstitutional.

In short, PELRA provides Knight with a "fair opportunity to participate" in the selection of a meet and confer representative. No unconstitutional infringement of associational rights occurs as a result of this democratic procedure.

E. Compelling Governmental Interests Support The Meet And Confer Structure Established By PELRA And Override Any Infringement Of First Amendment Interests.

The lower court ruled improperly, as argued above, that the meet and confer structure implemented by PELRA "infringes fundamental First Amendment guarantees." (Juris. A. 24). It further concluded that the meet and confer structure, as applied by the State Board and the MCCFA, was unsupported by "compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 27). The district court's conclusion should be rejected.

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[24] The lower court upheld the requirement of a democratic selection process, noting that a requirement that the State Board meet and confer upon the demand of any instructor could cause the result that "no meaningful faculty expression would emerge and that both faculty and administration would be deprived of the benefits from an orderly, systematic exchange of views." (Juris. A. 22).

PELRA persuasively states the interest which it seeks to achieve:

> The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.
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> Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:
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> (1) granting to public employees certain rights to organize and choose freely their representatives;
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> (2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and
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> (3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large.

Minn. Stat. § 179.61 (1982). Within this overall framework, PELRA establishes the meet and confer framework in order

"to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. § 179.73 (1982). Given the important objective of obtaining input from professional employees within a framework which promotes labor peace, the reliance on the exclusive bargaining representative to be the meet and confer representative is supported by compelling government interests.

The importance of the exclusivity principle, and the rationale underlying it, have been discussed earlier.[25] Briefly summarized, exclusivity avoids confusion in the presentation of employee views, avoids subjecting the employer to conflicting demands and minimizes the development of rivalries within the bargaining unit which would disrupt labor peace and detract from the benefits of collectivization.[26] Without

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[25] See discussion of the "reasonableness" of PELRA's meet and confer structure, *ante*, at pp. 24-25.

[26] Among the stipulations entered into between Knight and the State Board are the following, which bear upon the state's interests in such matters:

3. The goal of "labor peace"* is as important in the relationship between a public employer and its employees as it is between a private employer and its employees.

4. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in said employee unit.

5. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

. . .

* [footnote] "Labor peace" as used in this stipulation and at all other places herein is defined as a stable relationship between employer and employees which is characterized by the absence of work stoppages, work slowdowns, or unresolved disputes, and by the efficient continuation of public business and services. (A. 38).

exclusivity, there is a problem of inconsistency not only within the meet and confer team, but also between the meet and confer and meet and negotiate team.

The lower court recognized that interests such as these were sufficiently compelling to uphold the exclusivity principle where negotiation of terms and conditions of employment are concerned, consistent with this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 220-21, 224 (1977). The lower court found the interests less than compelling, however, when applied to meet and confer. The lower court's reasoning does not withstand scrutiny.

The court asserts that, unlike other professional employees, community college faculty members do not need the impact of being represented in meet and confer by an exclusive representative because of the tradition of shared decision-making in higher education. (Juris. A. 25). As argued above, the court's assumption that such a tradition existed is not persuasive with respect to the community colleges here at issue.[27] Moreover, the court impliedly agrees that the faculty governance opportunities available prior to PELRA were inadequate with respect to items now subject to meet and negotiate procedures. If pre-PELRA "shared decision making" was inadequate for "meet and negotiate" subjects, it was just as inadequate for "meet and confer" subjects.

The lower court also asserts that exclusivity is less needed because "intangible" issues are involved in meet and confer, as opposed to the "tangible fruits" of negotiations over terms and conditions of employment. (Juris. A. 25-26). The labeling of a matter as "intangible" does not make it unimportant. Decisions made as a result of the meet and confer process on such

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[27] See discussion, *ante*, at pp. 27-29.

matters as curriculum and overall budget will have substantial impact on the instructors in the bargaining unit. Curriculum decisions, for example, substantially affect the academic qualifications and number of instructors who will be on the faculty. The lower court concedes the importance of these issues by describing meet and confer as an "important academic forum" where the faculty "resolve virtually every issue outside the scope of mandatory bargaining." (Juris. A. 22). The resolution of these issues provides benefits to MCCFA members and non-members alike just as does the negotiation of terms and conditions of employment in meet and negotiate. A unified faculty voice forwarded by an exclusive representative is just as important where the "intangible" issues of meet and confer are concerned, as in the negotiation of employment conditions.

The lower court argues that the MCCFA's security as the meet and negotiate representative will not be threatened by an independent meet and confer team. This contention misses the point. The principle of exclusivity in meet and confer is supported by the compelling interests stated above regardless of any impact on the negotiations process. The contention is also wrong. There will be an inevitable interplay between the meet and negotiate, and meet and confer procedures. The history of the litigation of PELRA's scope of mandatory negotiation before the Minnesota Supreme Court teaches that the line between the two areas is not clear. For example, in *Minneapolis Federation of Teachers v. Minneapolis Special School District No. 1*, 258 N.W. 2d 802 (Minn. 1977), the Minnesota Supreme Court interpreted PELRA to require that a school district meet and negotiate concerning criteria and procedures for intra-district teacher transfers, but not the decision to transfer itself. According to the court, the transfer criteria and procedures "directly affect a teacher's welfare" and there-

fore were negotiable. 258 N.W. 2d at 805. In *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W. 2d 474 (Minn. 1981), however, the court (in a 5-4 decision) refused to require the school district to meet and negotiate alterations in supervisory employees' duties, assignments and salaries, despite a finding that the action had "substantial consequences for the employees involved." 311 N.W. 2d at 477. Most recently, the court ruled in *Ogilvie v. Independent School District No. 341*, 329 N.W. 2d 555 (Minn. 1983) that a school district must negotiate criteria for selecting teachers for transfer between school districts, but on the basis of a different standard—that such an issue was "not likely to hamper the school board's direction of educational objectives." Obviously, the determination under PELRA of which subjects are negotiable and which areas are not is fraught with difficulty and unpredictability.

Because of the uncertainty as to which procedure a matter should be submitted to, there is obvious potential for conflict between the meet and confer, and meet and negotiate teams. Such a conflict presents a clear threat to the bargaining representative's status. Further, in areas where elements of both mandatory and non-mandatory bargaining subjects are involved—*e.g.*, budget retrenchment or transfer—conflicting positions between the committees might well lead to further confusion or detriment to the faculty. The lower court is wrong, therefore, in its assertion that an independent meet and confer team would pose no threat to the security of the exclusive bargaining representative. For the same reasons, the lower court is incorrect in its assertion that the State Board would not be subjected to irreconcilable, conflicting demands. (Juris. A. 27). At best, the community college administration will face conflicting demands. At worst, the adminis-

tration will play one group off against the other in order to achieve its own ends. For these reasons, the rationale supporting exclusivity in the formal "meet and confer" process is just as compelling as in the "meet and negotiate" arena. If First Amendment interests are at all infringed by the PELRA meet and confer structure, compelling state interests justify such an infringement.

II. THE DISTRICT COURT'S SUPPLEMENTAL ORDER REQUIRING THAT CUMULATIVE VOTING BE USED IN MEET AND CONFER ELECTIONS IS WITHOUT CONSTITUTIONAL BASIS.

In its order of April 5, 1983, (A. 190), the lower court improperly ruled that a "fair opportunity to participate" in any separate meet and confer elections required the use of cumulative voting. This requirement is wholly unprecedented, and exceeds even the measures taken in the sensitive area of alleged racial discrimination in the election of candidates to public office.

The lower court's ruling depends on a factual finding which does not justify its extreme response. The lower court found:

> As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.

(A. 191). To remedy this perceived deficiency, the court ordered a cumulative voting system under which each voter would have a number of votes equal to the number of committee members being chosen, with the right to concentrate or distribute the votes among the candidates as desired. This system, the court found, would "ensure" that non-union faculty members will be able to elect at least one representative as-

suming a minimum number of non-union faculty exist and that they concentrate their votes. In essence, the lower court ruled that the First Amendment requires a voting scheme which will result in proportional representation of members and non-members on meet and confer committees.

The lower court cites no precedent for the proposition that the First Amendment requires either cumulative voting or proportional representation, and there is none. In fact, there appear to be no reported cases in which such a proposition has been urged.

In cases where systems for the election of public officials have been challenged on the basis of the Equal Protection Clause of the Fourteenth Amendment, the notion that the Constitution requires proportional representation has been rejected. The Court has held that, while the Constitution confers a right to "participate in elections on an equal basis with other qualified voters," it does not entitle a group in the minority to elect candidates in proportion to its numbers. *Mobile v. Bolden*, 446 U.S. 55, 75-78 (1980) (plurality opinion). Even if this case were held to be analogous to those involving alleged discrimination in the voting for public officials, it is plain that the lower court erred in determining that meaningful participation in the meet and confer process necessitated that the minority group to which the plaintiffs belong be ensured of electing its own representative.

Of particular interest is the Court's decision in *Whitcomb v. Chavis*, 412 U.S. 755 (1973). In reversing the district court's ruling that the Constitution required the disestablishment of a multi-member legislative district in favor of several single-member districts for elections to the Indiana legislature, the Court criticized as "not easily contained" the lower court's underlying rationale of required representation of minority

interests. 403 U.S. at 156. In discussing the extreme consequences which might result, the Court stated:

> Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting . . .

Id. The Court rejected this approach, stating that it was "unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." 403 U.S. at 160.

A cumulative voting requirement is particularly inappropriate where imposed in a context of collective bargaining. PELRA requires that there be a *single* meet and confer representative, and where a unit of professional employees have decided to collectively bargain that meet and confer representative is the exclusive bargaining representative. The lower court's order necessarily requires that there be a number of meet and confer representatives as a logical pre-condition for cumulative voting. The cumulative voting requirement therefore not only prevents employees from having an exclusive representative for both meet and negotiate, and meet and confer purposes, it also prevents employees from having a single meet and confer representative. The court's decision is analogous to a holding that the State of Minnesota may not have a single governor, but must have a panel of several governors to ensure minority representation. No such constitutional requirement exists. Certainly the interests in and benefits of exclusive representation in the area of labor relations, discussed at length above,[28] are grounds for rejecting such a proposition in this case.

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[28] See discussion, *ante*, at pp. 35-41.

The lower court's requirement of cumulative voting in meet and confer elections must be rejected. It is unsupported by constitutional precedent. And by ensuring that the exclusive representative of community college faculty members is no longer exclusive, it defeats important state interests.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING APPELLEES TWENTY PERCENT OF THEIR COSTS.

Under Rule 54(d) of the Federal Rules of Civil Procedure, the allowance of costs is largely left up to the discretion of the trial court. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964). That discretion, however, is to be exercised in accordance with recognized equitable principles, and the court's award will be set aside if an abuse of discretion is established. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). The lower court committed such an abuse of discretion in this case because its order that twenty percent of plaintiffs' costs be assessed against the State Board and the MCCFA is unrelated to the proportion of the proceedings below attributable to the issue on which Knight succeeded, and results in the MCCFA and State Board being required to subsidize conduct by Knight and his counsel which unreasonably and unnecessarily bloated this litigation.

The "meet and confer issue" was a very small portion of a major assault by Knight on the constitutionality of PELRA and the right of the MCCFA and the other appellant labor organizations to constitutionally function within PELRA's framework. Knight expended enormous time and energy in attempting to prove that the appellant labor organizations are

an "integrated" organization which is the constitutional equivalent of a "political party" and is engaged in a collective bargaining process which amounts to "fascism". (Juris. A. 4-5). This effort included a large amount of discovery directed towards these issues, and a substantial appellate practice in challenging lower court discovery orders, challenges routinely rejected as without foundation. *See Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) *cert. denied* 449 U.S. 823 (1980).

In denying appellants' motion for an amended judgment on the costs issue, the district court stated:

> Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 percent of the plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they challenged defendants' assertions that the "meet and confer" issue was addressed in only 3 percent of plaintiffs' exhibits, 6 percent of the trial transcripts, .004 percent of plaintiffs' proposed stipulations and by none of plaintiffs expert witnesses.

(Juris. A. 2). Despite this recognition of the small and discrete nature of the meet and confer issue, the court adhered to its twenty percent cost award. As rationale it offered an observation, inconsistent with the statement quoted above, that there is "overlap between the First Amendment claim as to meet and confer practices and other practices challenged by plaintiffs." *Id.*

The lower court was correct in its initial assertion that the meet and confer issue was a "largely discrete question of law and fact." The only overlap between the two sets of claims was that both purported to invoke the First Amendment of the Constitution. Beyond that, the meet and confer issue had nothing in common with Knight's other claims.

The lower court was justified in its decision to apportion costs, based on the limited nature of Knight's success in this case. Ample precedent upholds apportionment in such circumstances. *See, e.g., Scientific Holding Co. v. Plessey, Inc.*, 510 F. 2d 15, 28-29 (2d Cir. 1974); *K-S-H Plastics, Inc. v. Carolite, Inc.*, 408 F. 2d 54, 60 (9th Cir. 1969); *Commonwealth of Pennsylvania v. Local Union 542, I.U.O.E.*, 507 F. Supp. 1146, 1152-54 (E.D. Pa. 1980); *Steel Construction Co. v. Louisiana Highway Comm'n*, 60 F. Supp. 183, 192-93 (E.D. La. 1945). The specific apportionment which was made, however, constituted an abuse of discretion because it bears no rational relationship to the degree of Knight's success; in no way did the "meet and confer issue" amount to twenty percent of this case. This is clear from the uncontroverted analysis of the proceedings presented to the trial court by the appellant labor organizations pertaining to trial transcripts, exhibits, stipulations and expert testimony.

Not only does the lower court's apportionment of costs lack a rational relationship to Knight's limited success, it also has the effect of requiring the MCCFA and the State Board to subsidize conduct by Knight and his counsel which caused this case to be unreasonably protracted. Where such conduct exists, any apportionment of costs should protect the opposing party from being forced to provide such a subsidy. In *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied* 338 U.S. 948 (1950), the court stated the

denial of costs or assessment of partial costs to a prevailing party should be made under circumstances like these.

> As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record . . .

176 F. 2d at 11. *See, also, ADM Corp. v. Speedmaster Packaging Corp.*, 525 F. 2d 662, 665 (3d Cir. 1975) (trial court has the authority to deny costs when prevailing party unduly extended and complicated resolution of issues); *Jones v. Schellenberger*, 225 F. 2d 784, 794 (7th Cir. 1955), *cert. denied* 350 U.S. 989 (1956) (court denied victor costs because of reprehensible conduct prolonging and greatly increasing costs of suit).

The lower court severely criticized Knight and his counsel for the manner in which this litigation was conducted:

> Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood v. Detroit Board of Education, supra.*]

(Juris. A. 5 n. 2). The court further described appellees' theories as "frivolous" ones which could have been presented without the need for a trial of facts.

> Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. *Indeed, the presentation of plaintiffs' case*

has hindered rather than helped the court to resolve the issues raised in their complaint.

(Juris. A. 4). (emphasis supplied).

Given the district court's recognition of the wasteful and unreasonable conduct of Knight and his counsel on the non "meet and confer" issues, the court's ruling requiring the appellants to financially support the costs of that conduct is an abuse of discretion.

CONCLUSION

Based on the foregoing, the appellant labor organizations respectfully request that paragraphs 1, 2 and 3 of the District Court's Order for Judgment, contained in its March 30, 1982, order, be reversed. Should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of the portion of the District Court's order of April 5, 1983, which requires use of cumulative voting in meet and confer elections. Finally, should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of that portion of the order which requires the MCCFA and State Board to pay Knight twenty percent of his costs.

Respectfully submitted,

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